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No. 93-366

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH MOUAWAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL E. O'NEILL
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether it was reversible error under the Jencks Act, 18 U.S.C. 3500, for the government at a sentencing hearing not to provide the defendant with the notes made by a witness, when disclosure of the notes would have compromised a confidential informant, when the government provided the notes to the trial judge for *in camera* review, and when the judge concluded that the notes were consistent with the witness's testimony.

2. Whether the district court properly refused to grant petitioner's motion for a downward departure based on substantial assistance to the government.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is unpublished, but the judgment is noted at 993 F.2d 1533 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1993. A petition for rehearing was denied on June 7, 1993. Pet. App. A9-A10. The petition for a writ of certiorari was filed on September 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of New York to one count of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of transporting monetary instruments out of the country, in violation of 18 U.S.C. 1956(a)(2)(A). Petitioner was sentenced to 292 months' imprisonment, to be followed by four years' supervised release. The court of appeals affirmed. Pet. App. A1-A8.

1. Petitioner was arrested in 1988 after a lengthy investigation revealed his role in a scheme to import large quantities of heroin from Lebanon to the United States. See Gov't C.A. Br. 4.

2. After petitioner pleaded guilty, a presentence report was prepared. When petitioner objected to matters in the report, the court ordered an evidentiary hearing. Gov't C.A. Br. 6. One of the witnesses at the hearing was Drug Enforcement Administration Agent Gary St. Hilaire. Mar. 29, 1989 Tr. 36-147. Much of St. Hilaire's testimony concerned information he had received from confidential informants. *E.g.*, *id.* at 49, 77-121, 144-147. During the direct examination, *id.* at 82, and at the end of the direct examination, *id.* at 148-149, petitioner, relying on the Jencks Act, 18 U.S.C. 3500, asked the government to produce any prior statements of the witness. The government declined to produce St. Hilaire's debriefing notes, explaining that they would compromise the identity of a confidential informant. Mar. 29, 1989 Tr. 150-151. After some discussion, the government furnished the requested material to the district court for *in camera* review. See Pet. App. A4. "The court found no conflict between the * * * material and the [agent's] testimony" and thus denied petitioner's request to inspect the agent's notes. See *ibid.*

At sentencing, petitioner moved for a downward departure based on what he considered to be substantial assistance to the government. June 7, 1989 Tr. 17-18. The court started from the premise that it would have the authority to make such a departure under Sentencing Guidelines § 5K2.0 "under exceptional circumstances" even in the absence of a government motion under Sentencing Guidelines § 5K1.1. June 7, 1989 Tr. 18-19. After extensive discussion of petitioner's motion, *id.* at 19-32, the court concluded that it was "not inclined to depart. That is my ruling." *Id.* at 32.

3. The court of appeals affirmed. Pet. App. A1-A8. With respect to petitioner's Jencks Act claim, the court noted that "[p]rior to the adoption of the Guidelines, the government had no obligation to produce Jencks Act material during sentencing," and stated that it "s[aw] no indication that the Sentencing Commission intended to alter this principle." *Id.* at A4. In any event, the court explained, the government furnished the material "to the court for *in camera* review," and "[t]he court found no conflict between the Jencks Act material and the testimony." *Ibid.* In those circumstances, the court concluded that there was "no abuse of discretion in the court's refusal to require the government to release the Jencks Act material to defendants." *Ibid.*

The court also affirmed the district court's refusal to depart downward in response to petitioner's substantial assistance motion. Pet. App. A4-A5. The court noted that "[a] refusal to depart is not appealable unless the court mistakenly believed it had no power to depart." *Id.* at A4. Because the district court clearly recognized that it could depart absent a motion from the government, but stated that a downward departure was unwarranted, the court of appeals found that "the refusal to depart is not reviewable." *Id.* at A5.

ARGUMENT

1. Petitioner first argues (Pet. 9-12) that the Jencks Act, 18 U.S.C. 3500, requires the government to produce the prior statements of its witnesses at a sentencing hearing. We disagree, but in any event the question does not warrant review here.

The Jencks Act does not require the production of a witness's prior statements "until [the] witness has testified *on direct examination in the trial of the case*." 18 U.S.C. 3500(a) (emphasis added). The natural import of the reference to testimony "in the trial of the case" is that the statute does not apply to testimony at a post-trial proceeding such as a sentencing hearing.[1] That understanding of the language is bolstered by Fed. R. Crim. P. 12(i), which requires the government to disclose the prior statements of its witnesses at a hearing on a motion to suppress evidence. Before the adoption of Rule 12(i), courts uniformly had held that the Jencks Act did not apply to pretrial hearings. See *United States* v. *Sebastian*, 497 F.2d 1267, 1268-1270 (2d Cir. 1974); *United States* v. *Murphy*, 569 F.2d 771, 772-774 (3d Cir.), cert. denied, 435 U.S. 955 (1978); *United States* v. *Montos*, 421 F.2d 215, 220-221 (5th Cir.), cert. denied, 397 U.S. 1022 (1970); *United States* v. *Spagnuolo*, 515 F.2d 818, 820 (9th Cir. 1975). Hence, Rule 12(i) was adopted to extend the government's disclosure obligation to hearings on a motion to suppress.

The Second Circuit, in a pre-Guidelines case, applied the same analysis in determining that the Jencks Act does not require the government to produce prior statements of witnesses who testify at sentencing hearings.

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[1] In any event, it is not clear to us that the notes sought by petitioner were "statements" of St. Hilaire for purposes of the Jencks Act. See *Palermo* v. *United States*, 360 U.S. 343, 352-353 (1959).

United States v. *Fatico*, 603 F.2d 1053, 1056, 1058 (1979), cert. denied, 444 U.S. 1073 (1980). The court in this case followed *Fatico*, based on its view that there was "no indication that the Sentencing Commission intended to alter this principle." Pet. App. A4.

Petitioner correctly notes that the Third Circuit has held that the Jencks Act does require the government to produce prior statements of its witnesses at sentencing hearings. *United States* v. *Rosa*, 891 F.2d 1074, 1076-1079 (1989). For three reasons, however, the question does not warrant review in this case. First, the Third Circuit's decision rested on its understanding of Second Circuit law, drawn from dictum in the district court's decision in *United States* v. *Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978). See *Rosa*, 891 F.2d at 1077. As explained above, however, the Second Circuit made it clear on appeal in the *Fatico* case that the Jencks Act does not require production of the prior statements of witnesses at sentencing hearings. 603 F.2d at 1056, 1058. Accordingly, given the mistaken premise on which *Rosa* rests, there is considerable doubt that the Third Circuit will follow that decision in the future.

Second, the government's need to protect the identity of its confidential informant renders this an unusual case. The effect on the Jencks Act analysis of the harm of disclosing the informant's identity, cf. *Roviaro* v. *United States*, 353 U.S. 53, 59 (1957) (discussion of government's privilege to refrain from disclosing identity of confidential informer), makes it unlikely that review of the analysis in this case would provide useful guidance to courts considering the more common situation, where disclosure of Jencks Act material would not harm important governmental interests.

Third, whatever the merits of petitioner's argument, it is apparent that any error was harmless. As the court of appeals noted, the district court reviewed the materials

and concluded that there was no conflict between the materials and the testimony offered at petitioner's sentencing hearing. Pet. App. A4. It is well settled that a Jencks Act violation can be harmless error, particularly when the trial court has reviewed the materials *in camera*. See, *e.g.*, *United States* v. *Lam Kwong-Wah*, 924 F.2d 298, 309-310 (D.C. Cir. 1991). Petitioner offers no basis for supposing that the district court erred in evaluating the materials. Accordingly, petitioner's Jencks Act claim does not warrant review.

2. Petitioner also argues (Pet. 13-15) that the district court erred in declining to depart downward based on what petitioner believed to be substantial assistance to the government; in petitioner's view, the district court erred by failing to recognize that substantial assistance can justify a departure under Sentencing Guidelines § 5K2.0 even without extraordinary circumstances. That claim is meritless.

Sentencing Guidelines § 5K2.0 implements the congressional mandate that a district court can depart from the sentencing range prescribed by the Sentencing Guidelines only if it finds a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b). Because the Sentencing Commission explicitly considered the circumstances in which a departure would be warranted on the basis of assistance to the government (in Sentencing Guidelines § 5K1.1), departure on the basis of assistance to the government under Sentencing Guidelines § 5K2.0 would be appropriate only in "unusual" circumstances. Sentencing Guidelines § 5K2.0; see U.S. Sentencing Comm'n, *Guidelines Manual* 5-6 (1992) (departure is appropriate only in "atypical" and "unusual" cases in which "conduct significantly differs from the norm").

Petitioner does not suggest that any federal court outside the Second Circuit has authorized such a departure without some showing of unusual circumstances.[2] Petitioner's claim accordingly does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL E. O'NEILL
Attorney

NOVEMBER 1993

[2] Petitioner errs in relying (Pet. 14-15) on the Second Circuit's earlier decision in *United States* v. *Khan*, 920 F.2d 1100 (1990), cert. denied, 499 U.S. 969 (1991). In *Khan*, the defendant asserted that he warranted a downward departure under Section 5K2.0—even though the government had not moved for such a departure below—because he had allegedly saved a confidential informant's life. The court agreed that such a situation might warrant consideration under Section 5K2.0 "[b]ecause rescuing confidential informants from the jaws of death is not a grounds for departure taken into account by the Guidelines." 920 F.2d at 1107. The court did not state that substantial assistance to the government could justify a departure without unusual circumstances; it is plausible to read the court's opinion as implicitly concluding that the defendant's alleged conduct did present unusual circumstances. See *ibid.* In any event, any tension between *Khan* and the decision in this case presents a problem to be resolved by the Second Circuit, not this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).